Case Nos. 227625, 22A1016

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL TISIUS, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

On Petition for Writ of Certiorari
to the Missouri Supreme Court

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND MOTION FOR STAY

THIS IS A CAPITAL CASE
EXECUTION SCHEDULED FOR JUNE 6, 2023

ELIZABETH UNGER CARLYLE*
Carlyle Parish LLC
6320 Brookside Plaza #516
Kansas City, Missouri 64113
elizabeth@carlyleparishlaw.com

KEITH O'CONNOR
Keith O'Connor, LLC
PO Box 22728
Kansas City, MO 64113
Mo Bar No. 63134
Phone: 816-225-7771
Keith@keithoc.com

LAURENCE E. KOMP
Capital Habeas Unit, Chief
Federal Public Defender,
Western District of Missouri
1000 Walnut St., Ste. 600
Kansas City, MO 64106
(816) 471-8282
laurence_komp@fd.org

*Counsel of Record, Member of the Bar of the Supreme Court

COUNSEL FOR PETITIONER

CAPITAL CASE

QUESTION PRESENTED

Nineteen-year-old Michael Tisius was charged with two counts of first-degree murder for the killings of two officers guarding a small, rural jail. Recently released from jail himself, Mr. Tisius returned at the behest of the older, manipulative inmate Roy Vance, to help Vance escape. Vance's plan was for Mr. Tisius and Tracie Bulington to use a gun to get the jailers to give them the keys to the cells, lock the jailers in a cell, free Vance, and then flee. Due to Mr. Tisius's immature brain and cognitive impairments affecting him at the time of the offense, the plan went poorly, and in a panic, Mr. Tisius shot and killed the two jailers.

Mr. Tisius's age, challenges in his prefrontal cortex impairing his ability to make wise decisions in high-pressure situations, a history of mental illness (including auditory processing challenges), and a brief life riddled with serious physical abuse by his brother and staggering neglect by his mother and father, caused this senseless tragedy. Since incarceration in 2001, Mr. Tisius has peacefully existed, channeling his energies into skillful artistic creations. A psychologist who evaluated Mr. Tisius over a span of 20 years (since 2003) believes his present-day maturity reflects the exact trajectory medical experts would expect of a juvenile offender.

The case presents the following question:

> Do executions of persons who committed their crimes when they were under the age of 21, or, at the least, the execution of a 19-year-old offender who suffered from significant mental impairments due to his immature and underdeveloped brain, violate the Eighth Amendment?

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND MOTION FOR STAY OF EXECUTION

The state suggests several reasons why this Court should not review the important question of whether the U.S. Constitution prohibits the execution of Mr. Tisius, who committed his crime at age 19. This Court should reject each contention, grant certiorari, and hold that executions of persons who committed their crimes at age 19 are unconstitutional.

I. The Missouri Supreme Court denied relief on the merits.

The state first argues that the Missouri Supreme Court's unexplained decision was not a ruling on the merits. The state first attempts to distinguish *Harrington v. Richter*, 562 U.S. 86, 99 (2002), on the ground that Mr. Tisius's filing in the Missouri Supreme Court was procedurally barred. The state cites *Byrd v. Delo*, 942 F.2d 1226, 1231 (8th Cir. 1991), for this proposition. But in *Byrd*, the Missouri Supreme Court initially issued an unexplained decision, then later issued a second order clarifying that the decision was procedural. *Id* at 1227. That statement was, of course, the "plain statement" required for this Court to find that a state decision was based on procedural default. *Harris v. Reed*, 489 U.S. 255 (1989). Unlike in *Byrd*, the Missouri Supreme Court in Mr. Tisius's case provided no explanation, initial or clarifying, regarding its reasoning for denying Mr. Tisius's petition. As it stands now, the court's ruling is an unexplained, checkbox denial; there was no required "plain statement" for this Court to find the Missouri Supreme Court's decision to be based on procedural default because there were no statements made at all as to the court's reasoning. Thus, under *Harrington*, because there was

no "indication or state-law procedural principles to the contrary," the Missouri Supreme Court's summary denial can only be a decision on the merits of Mr. Tisius's claims. *Harrington*, 562 U.S. at 86.

Furthermore, contrary to the state's contention, Missouri law clearly allows Mr. Tisius's claim. The Missouri Supreme Court has held that when a claim of which the petitioner had no timely notice is presented, habeas jurisdiction is proper; as the court put it in *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 254 (Mo. App. 2011), a case dealing with jury misconduct, "Nothing in this record suggests that Dale Helmig was earlier alerted or should have been earlier alerted to the prospect of discovering that the jury had been provided a map that was never introduced into evidence during its deliberations."

Koster relied on *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003). There, the Missouri Supreme Court held that a petitioner may have an otherwise procedurally defaulted claim considered in a habeas corpus proceeding if he establishes "cause for failing to raise the claim in a timely manner and prejudice from the constitutional error asserted." *Amrine*, 102 S.W.3d at 546. This basis for overcoming default was characterized by the *Amrine* opinion as a "gateway" cause and prejudice claim. *Id.* In his state habeas petition, Mr. Tisius alleged sufficient facts to satisfy the *Amrine* requirements of both cause and prejudice. But since the Missouri Supreme Court did not make a "plain statement" that Mr. Tisius failed to meet the procedural requirements of *Amrine* and *Koster*, there subsequently is no

"state-law procedural principle" that would prevent the application of the *Harrington* rule.

In his state habeas petition, as he did here, Mr. Tisius argued that he could not have raised this ground for relief at the time of his most recent direct appeal or state post-conviction proceeding. The time for including grounds in those proceedings ended in 2011 (appeal) and 2012 (post-conviction). But, as explained in detail in Mr. Tisius's petition, both science and society have changed significantly since that time. This ground for relief simply was not available at the time of Mr. Tisius's trial, so trial and appeal counsel could not have been faulted in post-conviction proceedings for failing to raise it.

The state argues that a prior claim that *was* raised in Mr. Tisius's case, that he had a "mental age" under 18 at the time of the offense, is the same ground raised here. It is not. As the Missouri Supreme Court held in *Tisius v. State*, 519 S.W.3d 413, 431 (Mo. banc 2017), "mental age" is not a criterion for death penalty eligibility. Rather, chronological age is what matters, and it was the subject of Mr. Tisius's recent Missouri Supreme Court petition. The chronological age claim raised here could not have been raised earlier because the factual basis for it did not exist. Thus, the state's reliance on *State ex rel. Strong v. Griffith*, 462 S.W.3d 732 (Mo. banc 2015), is misplaced. In *Strong*, which was of course NOT an unexplained decision, the court made clear that because Strong's claim was that he was mentally ill at the time of trial, and because that evidence was available or could have been discovered at the time of trial, he could not raise the issue in a pre-execution

petition for writ of habeas corpus. *Id.* at 738-39. Mr. Tisius's claim is factually different. The scientific research and societal standards of today, which serve as the foundation for Mr. Tisius's claim, clearly did not exist in 2012, and thus Mr. Tisius's case is not governed by *Strong.*

In short, the *Harrington* rule applies. It should be noted that the state's position on this issue has fluctuated depending on the forum and case, and its argument here is disingenuous. Just seven months ago in November 2022, in this Court in *Johnson v. Vandergriff,* No. 22-5947, BIO at pp. 10-11, 14-19, the state argued, as it does here, that the unexplained Missouri Supreme Court decision in Mr. Johnson's case was not a merits ruling. But then in responding to Mr. Tisius's petition in the Missouri Supreme Court, the state argued that the Missouri Supreme Court's decision in *Johnson* ***was*** a merits ruling, and asked the court to follow it—this shameless about-face came in January 2023, just two months after it argued Missouri Supreme Court's *Johnson* decision was not a merits ruling. Response in Opposition, *State ex rel. Tisius v. Vandergriff*, SC99938, p. 21. The state's apparent willingness to change its tune depending on the result it wishes to achieve alone should persuade this Court that there is no "plain statement" of default here. The state insists that the Missouri Supreme Court's decision on Mr. Tisius's petition was based on procedural default merely because that is its most convenient argument now—not because it is accurate or the truth.

Certainly, the Missouri Supreme Court knows how to deny a claim on the basis of procedural default. *See Byrd*; *Clay v. Dormire*, 37 S.W3d 214 (Mo. banc

2000); *State ex. Rel Nixon v. Sprick*, 59 S.W.3d 515 (Mo. banc 2020); *Price v. State*, 422 S.W.3d 292 (2014). The state court did not do so here. This Court may review the Missouri Supreme Court's unexplained merits ruling.

II. This Court should consider Mr. Tisius's state court habeas petition.

The state suggests that as a matter of policy, this Court should confine itself to reviewing state court criminal law decisions only in the context of federal habeas because that policy would better "respect our system of dual sovereignty." BIO at p. 14 (quoting *Shinn v. Ramirez*, 142 S. Ct. 1718, 1730 (2022)). Of course, this Court retains jurisdiction over final judgments of state courts in constitutional matters like that here, and has regularly exercised it since *Lawrence v. Florida*, 549 U.S. 327, 335 (2007), contravening the state's suggestion that this Court rarely does so[1]. *See generally* Z. Payvand Ahdouf, *Direct Collateral Review*, 121 Columbia Law Rev. 159 (2021). This exercise of jurisdiction has only increased in recent years. *See, e.g., id.* at 163-64; *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1903 (2016); *Foster v. Chatman*, 136 S.Ct. 1737, 1742 (2016); *Wearry v. Cain*, 136 S. Ct. 1002, 1002 (2016) (per curiam); *Montgomery v. Louisiana*, 136 S. Ct. 718, 726–27 (2016); *Maryland v. Kulbicki*, 577 U.S. 1, 3–4 (2015) (per curiam); *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1906–07 (2017); *Moore v. Texas*, 137 S.Ct. 1039, 1044 (2017); *Rippo v. Baker*, 137 S. Ct. 905, 906 (2017) (per curiam). *Turner v. United States*, originated on

[1] Contrary to the State's implication, *Lawrence* does not articulate a basis for the failure to exercise jurisdiction over state collateral review cases; it merely states that this Court seldom does so.

collateral review from a criminal proceeding in the District of Columbia. 137 S. Ct. 1885, 1891 (2017).

The fact that Congress has chosen to severely restrict habeas corpus review emphasizes the importance of this Court's consideration of state court cases in order to exercise justice and maintain uniformity. The state notes that Mr. Tisius has concurrently filed a federal habeas petition in the district court, which was summarily rejected under AEDPA. For that reason, this Court should make itself available to Mr. Tisius in this proceeding so that it may review this serious constitutional claim free of statutorily imposed procedural obstacles. In fact, under AEDPA, no federal court can find a new constitutional standard such as that sought here, because a federal court can only grant relief if the state court decision unreasonably applied *established* federal law from this Court. 28 U.S.C. § 2254(d). Thus, the only way this constitutional violation might be corrected is if this Court reviews it based on a state court ruling. This is consonant with the approach recognized by Justice Sotomayor in *Halprin v. Davis,* 140 S.Ct. 1200, 1201 (2020), where she voted to deny certiorari because "state court proceedings are underway to address [Halprin's claim.]" (Sotomayor, J, concurring in the denial of certiorari.) Mr. Tisius has filed state court proceedings, and they were unavailing. It is understandable that the state would like to eliminate any opportunity for this Court to make new law in criminal cases, but this Court's Constitutional obligation to apply and construe the application of the Constitution of state law cannot be abandoned. *Marbury v. Madison*, 5 U.S. 137 (1803).

III. This Court should review the issue of death penalty eligibility at age 19.

Despite the fact that Mr. Tisius presented voluminous examples for this Court regarding the evolution of scientific and societal knowledge about the maturity of the human brain, the state argues that "nothing has changed since *Roper [v.* Simmons, 543 U.S. 551 (2005)] that would justify expansion." BIO p. 16. The state argues that Mr. Tisius's arguments are the same ones rejected in *Roper*, *id.* at 17, but ignores the fact that the *Roper* Court did not have the benefit of the 18 years of neurological and psychological research steadily developed since 2005 that is described in Mr. Tisius's petition.

In particular, Dr. Steinberg's report, App. p. 91, explains that "In **the past ten years**, additional scientific evidence has accrued indicating that many aspects of psychological and neurobiological immaturity characteristic of early adolescents and middle adolescents are also characteristic of late adolescents." (emphasis added). Specifically, Dr. Steinberg states:

> Further study of brain maturation conducted **during the past decade** has revealed that several aspects of brain development affecting judgment and decision-making are not only ongoing during early and middle adolescence, but continue at least until age 21 . As more research confirming this conclusion accumulated, by 2015 the notion that brain maturation continues into late adolescence became widely accepted among neuroscientists, and additional evidence consistent with this view has continued to be published in scientific journals.

App. p. 93a (emphasis added).

Obviously, research conducted during the past decade was not available to this Court in 2005. Dr. Steinberg's report contains specific citations to that

research, which will not be repeated here. The state's assertion that "nothing has changed" is simply wrong.[2] Similarly, Dr. Erin Bigler relied on a 2017 article concerning the effects of childhood maltreatment on the developing brain. App. p. 358a (citing Teicher et al. [The effects of childhood maltreatment on brain structure, function and connectivity. Nat Rev Neurosci. 2016 Sep 19;17(10):652-66. doi 10 .1038/nm.2016.111]). Dr. Bigler also references much more recent brain imaging studies which had not yet been conducted in 2010. App. p. 360a. In summary, much has changed since *Roper*, and this Court should change its approach, too.

The state next suggests that this Court abandon the evolving standards of decency test for evaluating capital cases. BIO p. 17. The state points out that in *Glossip v. Gross*, 576 U.S. 863, 869 (2015), this Court observed that "it is settled that capital punishment is constitutional." That observation was made in a totally different context than exists here. *Glossip* involved the means used by the state to carry out an execution not the propriety of a death sentence. The Court found that because capital punishment is constitutional, "there must be a means of carrying it out." *Id.* (citing *Baze v. Rees*, 553 U.S. 35, 47 (2008) (plurality opinion). That conclusion does not, as the state suggests, foreclose the possibility that this Court will never again decide that the death penalty does not apply to additional

[2] At BIO p. 21, the state suggests that one of Mr. Tisius's experts relied on a 2009 article by Dr. Sarah Johnson indicating that research "in the last decade" indicates that the brain may not mature before the person's mid-20s. The citation is to App. pp. 172a-176a. That citation is to the declaration of Dr. Frank Baumgartner, who described statistical studies about the frequency of executions and death sentences of adolescents. The study cited by the state is not included in the certiorari petition.

categories of persons who have not yet been identified by the Court. Nor did the Court foreclose that possibility in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). In *Bucklew,* another case involving methods of execution rather than the validity of a death sentence, the Court indicated that it would be up to the legislature to eliminate death as a punishment. *Id.* at 1122-23. But the Court immediately went on to say that the Eighth Amendment "does speak to how States may carry out the punishment. . . ." *Id.* at 1123. The Court then went on to describe how public tolerance for methods of execution had changed over time, informing the Eighth Amendment analysis.

The state then suggests that in determining societal attitudes, this Court is restricted to counting how many state laws have endorsed the result sought. This Court's review is not so restrictive. For example, in *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008), this Court considered, among other evidence, "statistics about the number of executions." Moreover, in *Atkins v. Virginia*, 536 U.S. 304, 313 (2002), this Court made clear that in its duty to consider evolving standards of decency, it must ask "whether there is reason to disagree with the judgment reached by the citizenry and its legislators."

The fact that relatively few state legislatures have addressed the issue of eligibility for the death penalty for late adolescents is likely due in part to the fact, as explained in the petition, that relatively few late adolescents are subjected to the death penalty in the first place and that relatively few late adolescents are actually

executed. That, however, is of little solace to people like Mr. Tisius, who is among those few whom the state seeks to put to death despite their youth.

The state notes that this Court declined to hear a similar challenge in *Johnson v. Missouri*, 143 S.Ct. 477 (2022). The case presented in *Johnson* is much different than that presented here. In *Johnson*, the petitioner argued generally that "The intervening period has seen a dual evolution in law and science." Petition, 22-5947, p. 35. But Mr. Tisius has presented this Court with the actual data in Dr. Steinberg's report. Further, unlike in *Johnson*, this Court has specific data about the ways Mr. Tisius's brain illustrates and confirms this new scientific research. In particular, Dr. Stephen Peterson first examined Mr. Tisius when he was 22 and has examined him twice since, when Mr. Tisius was 31 and 41, over a span of almost 20 years. He has observed and documented the ways in which Mr. Tisius has matured over that time and has seen Mr. Tisius develop into a mature adult. *See* App. pp. 41a-60a. Dr. Erin Bigler, a neuropsychologist, described Dr. Peterson's multi-decade longitudinal study as "one of the most powerful research methods when studying human behavior[.]" App. p. 356a.

The state denigrates the evidence of Mr. Tisius's seizures as being based only on Mr. Tisius's memory and description of his mental state at the time of the crime, but in fact, Dr. Bigler, who made that diagnosis, based it largely on his evaluation of testing performed by other experts, who included measures to determine whether Mr. Tisius might have been faking. Dr. Peterson concluded, "There is no evidence of malingering or deception by Michael Tisius especially in view of his consistent

presentation from 2003-2018 to this writer, and in 2018 to Doctors Love, Woods, and Watson." App. p. 60a. Contrary to what the state suggests, the fact that there is a new diagnosis does not mean that Mr. Tisius has fabricated his symptoms. And it is certainly no reason for this Court to decline to consider the case. In fact, the existence of new, reliable evidence will inform this Court's consideration of the important question of whether the time has come to extend the rule of *Roper* to individuals like Mr. Tisius who were little different than a juvenile at the time of their offense.

IV. This Court should stay Mr. Tisius's execution pending review.

Finally, the state argues that Mr. Tisius is not entitled to a stay of execution because he does not meet the standards of *Hill v. McDonough,* 547 U.S. 573, 584 (2006). In fact, as discussed in Mr. Tisius's application for stay, he meets each *Hill* factor easily.

As discussed above, contrary to the state's contentions, Mr. Tisius has a likelihood of success on the merits.

Incredibly, the state then suggests that Mr. Tisius will not be injured by the denial of a stay because he has had full review of his case. As discussed above, the claim involved here did not become available to Mr. Tisius until he had concluded that review. Simply put, he has not had full review of his case. And if his June 6th execution is not stayed, Mr. Tisius will not only be deprived review of a strong constitutional claim, he will be dead.

Finally, the state says that a stay will "irreparably harm both the State and Tisius's victims." BIO, p. 23. The state and Mr. Tisius's victims will not suffer an irreparable harm. A stay, by its nature, is not permanent; it is a temporary pause while review is ongoing. There is no irreparability. The only party who is at risk of irreparable harm is Mr. Tisius, because in 3 days he will be dead unless a stay is issued. The state suggests that only when Mr. Tisius is dead can his victims achieve "real finality." Of course, had the state not sought the death penalty in the first place, "real finality" would have occurred long ago. Nor is it clear that the finality that would result from Mr. Tisius's execution would actually assist the families of the victims. *See* Nancy Berns, *Contesting the Victim Card: Closure Discourse and Emotion in Death Penalty Rhetoric*, 50 Sociological Quarterly 383, 396 (2009), quoting a victim family member "Don't use that word with me. I hate that word. I don't know who made that word up. There is no closure. So many people don't seem to understand that. There is no closure:" Jody L. Madeira, *Capital Punishment, Closure, and Media*, Oxford Research Encyclopedia, Criminology and Criminal Justice (Oxford University Press 2018), p. 6 ("[The families who lost loved ones in the Oklahoma City bombing] almost unanimously denied that closure existed, lamenting the impossibility or finality of 'getting over it' and speaking instead of the possibility of adjusting or 'moving on'").

Clearly, the harm that Mr. Tisius will suffer if he is executed without review greatly exceeds that suffered by the state.

In his motion for stay, Mr. Tisius explained why the final *Hill* factor, lack of delay, militates in favor of a stay. The state did not address this factor in the BIO, so Mr. Tisius relies on the discussion in his motion to establish that there has been no delay justifying the denial of a stay.

Conclusion

As this Court has repeatedly recognized, "death is different," and a defendant subject to that sentence is entitled to extra procedural protection. *Zant v. Stephens*, 462 U.S. 862, 884 (1983) (requiring heightened reliability in the decisions made by jury and judge during a capital trial); *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) ("Under the Eighth Amendment, the death penalty has been treated differently from all other punishments.").

Mr. Tisius has presented to this Court a full opportunity to give the protection required by the Eighth Amendment to Mr. Tisius and persons like him who committed their crimes when they were late adolescents. This Court should grant certiorari and a stay to allow full briefing and argument.

Respectfully Submitted,

/s/ Elizabeth Unger Carlyle
ELIZABETH UNGER CARLYLE*
Carlyle Parish LLC
6320 Brookside Plaza, #516
Kansas City, MO 64113
Mo. Bar No. 41930
(816) 525-6540
elizabeth@carlyleparishlaw.com

KEITH O'CONNOR
Keith O'Connor, LLC
PO Box 22728
Kansas City, MO 64113
Mo Bar No. 63134
Phone: 816-225-7771
Keith@keithoc.com

LAURENCE E. KOMP
Capital Habeas Unit, Chief
Federal Public Defender
Western District of Missouri
1000 Walnut St., Ste. 600
Kansas City, MO 64106
(816) 471-8282
laurence_komp@fd.org

COUNSEL FOR PETITIONER

*Counsel of Record, Member of the Bar of the Supreme Court